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IN THE
Supreme Court of the United States
October Term, 1995

NORTH CAROLINA POWER,
Petitioner,
v.
STATE OF NORTH CAROLINA *ex rel.*
UTILITIES COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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A.

The United States argues in its Brief ("Brief") that a decision under the federal Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 824a-3, by one State establishing the wholesale rate an electric utility must pay to a Qualifying Facility ("QF") has no preemptive effect over state retail ratemaking in another State. In support of its argument, the United States interprets several sections of PURPA for the proposition that when a State exercises the ratemaking power delegated to it by PURPA and establises a wholesale rate for a multistate utility this rate is not binding upon any other State because each State "control(s) only the operations of utilities within its own borders." Brief at 14.

This interpretation by the United States raises several concerns. First, it compromises the primary goal of PURPA to encourage the development of alternative suppliers of electric energy. That encouragement is manifested by not only the favorable pricing provisions of PURPA but also its exemption of QFs from other State laws generally applicable to electric utilities.[1] In order to champion the development of QFs, Congress unburdened QFs from extensive State regulation.

> The conferees wish to make clear that cogeneration is to be encouraged under this section and therefore the examination of the level of rates which should apply to the purchase by the utility of the cogenerator's or small power producer's power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner. The establishment of utility type regulation over them would act as a significant disincentive to firms interested in cogeneration and small power production.

Conference Report No. 95-1292, p. 98 (Oct. 6, 1978).

The United States' proposed "solution" to the issues in dispute here is inconsistent with that expressed Congressional intent; the United States suggests that QFs attempting to sell power to a multistate electric company, such as Virginia Power, would need to obtain approval in *each* State thereby multiplying the regulatory oversight and discouraging their development:

> PURPA's statutory and regulatory structure does not appear to have created any significant problems for multistate utilities. Such utilities can avoid incurring costs that they cannot fully pass on by obtaining prior approval of wholesale prices from each jurisdiction in which power purchased from a QF will be sold.

Brief at 16. This proposed "solution" would have added significant costs and delay for Ultra Cogen and the doz-

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[1] 16 U.S.C. 824a-3(e).

ens of other QFs now providing power to Virginia Power. More importantly in terms of national policy, it is unlikely that Congress would have meant this as the "solution" when viewed in the context of the many regional electric holding companies that serve customers in several states from a combined pool of electric resources.[2]

Next, the United States inappropriately minimizes the express delegation of federal authority over wholesale electric sales to the States. Prior to PURPA, States had no jurisdiction to interfere with wholesale electric rates, which were federally established and deemed to be in interstate commerce. Likewise, prior to PURPA, no State had any authority to set a wholesale rate. PURPA, however, authorized States to set wholesale rates for purchases by electric utilities from QFs. The Virginia State Corporation Commission ("VSCC" or "Virginia") thus acted to render a federal decision in setting the wholesale purchase price Virginia Power must pay for power from the Ultra Cogen units. As such, the VSCC's decision stands on the same legal ground as a decision by the Federal Energy Regulatory Commission ("FERC") in setting other wholesale rates.

B.

The United States states that PURPA only sets "broad federal parameters," leaving implementation largely to each State, with margins for disuniformity and experimentation. Brief at 14. While the United States is correct that PURPA contemplates leeway for the States in resolving disputes and in establishing avoided cost rates, that does not nullify the status of the actions by the State regulatory commissions. Thus, when Virginia set

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[2] For example, American Electric Power ("AEP") has operating electric subsidiaries in Virginia, Indiana, Ohio, West Virginia, Kentucky and Michigan. Allegheny Power Systems ("APS") has operating electric subsidiaries in Virginia, Maryland, Ohio, Pennsylvania and West Virginia. Under the United States' suggested "solution," a QF desiring to sell electric power to AEP or APS, for example, would require approval in all of the States in which the holding company serves.

avoided cost rates for Ultra Cogen at $341 per kW for the first 15 years of a 25 year contract, Virginia was free to rely upon administratively determined avoided costs as projected on November 12, 1987 and was not bound to apply the different measure of avoided costs that North Carolina later determined to be appropriate.

PURPA's overall objective is to encourage cogeneration, and that blends with the continuing national objectives articulated prior to PURPA to encourage the free flow of wholesale power in interstate commerce without piecemeal regulation by each jurisdiction where the power is resold. These policies are not advanced by a regulatory scheme—advocated by the United States—where parts of a QF contract are regulated by one State through one rate and other parts of the contract are regulated by another State through a different rate. And nothing in PURPA remotely contemplates this type of fractured, piecemeal regulation of QF arrangements with a multistate electric utility.

The analysis of the United States focused almost exclusively on the provisions of PURPA. Equally important and relevant are the Federal Power Act and the decisions of this Court leading to the Act's passage. The Federal Power Act was passed to fill the regulatory gap created by the decisions of this Court holding that the States did not have jurisdiction over wholesale power transactions.[3] These decisions were in response to the chaos created within the wholesale power market when each State in which such power was resold asserted jurisdiction and sought to establish its own rate. Subsequently, the Federal Power Commission (now the FERC) was established and given exclusive jurisdiction over wholesale power transactions to bring order from such chaos.[4]

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[3] *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90 (1927).

[4] *Jersey Central Power & Light Co. v. Federal Power Comm'n*, 319 U.S. 61, 67-68 (1943).

In 1978 Congress carved out an exception to FERC's exclusive jurisdiction over wholesale rates when it passed PURPA and mandated that limited federal decision-making be entrusted again to the States. Absent any definitive guidance from Congress in PURPA, there is no reason to believe that the federal decision-making as to any one QF contract should be divided between several States as now advocated by the United States. Such a regulatory scheme can only lead to chaos again among the States, and, in this instance, chaos for QFs that were granted favored status under PURPA in order to relieve this type of extensive State regulation.

C.

The United States dismisses *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 354 (1986) and *Mississippi Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354 (1988) as inapplicable to this case because at issue here "are state determinations under PURPA, not federal determinations by FERC under the Federal Power Act." Brief at 15. This distinction, however, misses the point. *Nantahala* and *Mississippi Power* stand for the proposition that States cannot establish retail rates in conflict with federally established wholesale rates. Here, Virginia established QF wholesale rates in accordance with the federal power delegated to it under PURPA; therefore, applying the rationale of *Nantahala* and *Mississippi Power*, another State should not be able to establish conflicting or inconsistent retail rates. Put in the words of this Court, Virginia was using its "state adjudicatory machinery" to enforce the QF's federal right to sell power at wholesale to electric utilities:

> Any other conclusion [than that Mississippi has jurisdiction to implement Section 210 of PURPA] would allow the States to disregard both the pre-eminent position held by federal law throughout the Nation, . . . and the Congressional determination that the federal rights granted by PURPA can appropri-

ately be enforced through state adjudicatory machinery.[5]

Thus, *Nantahala* and *Mississippi Power* are directly on point. Here, Virginia was making a federal decision concerning the cost of wholesale power. It is the federal/wholesale nature of the transaction, prescribed by federal law, that triggers federal preemption of inconsistent State regulation by North Carolina.

Importantly, the substance of the North Carolina decision cannot be overlooked. North Carolina, through a State retail ratemaking decision, disallowed the recovery of $1.4 million per year of wholesale power costs. As such, these wholesale costs were trapped through State retail ratemaking, and Virginia Power was not allowed to collect that revenue. The State trapping of wholesale costs is the very event proscribed by *Nantahala* and *Mississippi Power*. Moreover, the State involvement in the ratemaking requirements of PURPA was designed to assure that an electric utility dealing—possibly reluctantly—with a QF would not be left with unrecoverable costs from purchasing QF power. The North Carolina decision creates exactly that result for Virginia Power.

D.

The United States asserts that at the time of the 1987 and 1988 VSCC decisions, Virginia had a policy of encouraging favorable consideration of local economic benefits resulting from a particular project and that the arbitrator took such policy into account by "requiring petitioner to contract with Ultra Cogen."[6] The United States'

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[5] *FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982).

[6] The United States asserts that Virginia relied upon intangible factors favorable to Virginia in determining that Virginia Power should contract to buy the power. The "local economic factors" the United States suggests the arbitrator "appears to have taken into account" are that the Ultra Cogen facilities "are coal-fired cogen-

citations to support this assertion are solely to the North Carolina Utilities Commission's ("NCUC") orders purporting to interpret Virginia policy, not directly to any specific Virginia policy pronouncement. Contrary to these North Carolina interpretations of the Virginia policy, the VSCC had articulated its policy to be to give reasonable weight to intangibles "bearing in mind the mandate of PURPA that cogeneration and small power production is to be encouraged." App. 224a. The VSCC policy was that "we did not hold, nor did we intend to suggest that any QF is to be paid more than full avoided cost for any reason." App. 230a. The VSCC stated that "its holdings on rate levels were intended to meet, not exceed, full avoided costs" (App. 231a) and that "no QF should receive more than full avoided costs." App. 232a. Nothing in the 1987 and 1988 VSCC Ultra Cogen orders conflicts with this policy.

The United States, however, suggests that it is unclear whether the VSCC based its decision requiring Virginia Power to pay Ultra Cogen $341 per kW exclusively on federal law and, therefore, this case is an inappropriate vehicle to resolve the federal preemption issue:

> To the extent that the Virginia arbitrator's decision may be ambiguous as to whether it actually exceeds PURPA's avoided-cost ceiling (based on state law) or whether it depends solely on federal law, that ambiguity might have been eliminated by the Virginia Supreme Court if petitioner had pursued an appeal of the VSCC's order adopting the arbitrator's determination.

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eration facilities in lesser populated areas of the Commonwealth." App. 189a. These factors were considered to conform to earlier VSCC orders requiring the Commission to consider "system reliability inherent in the prospect of having many small dispersed QF's throughout the region" not a "single large utility plant." App. 224a. The basis for this requirement is FERC's own regulations, not State law. 18 CFR § 292.304(e)(2)(vii).

Brief at 17-18. But there is no ambiguity in the VSCC orders. The VSCC established the cost of $341 per kW through resort to the proxy of the Company's cost of its Chesterfield 7 plant, as projected on November 12, 1987, as allowed by PURPA. As noted above, the VSCC's calculation of avoided costs "were intended to meet, not exceed, full avoided costs." App. 231a. Thus, VSCC's order was based clearly on federal law.

E.

Virginia Power has taken every reasonable step required to comply with PURPA and to protect the often competing ratepayer and QF interests. Virginia Power argued before the VSCC that a lower federal avoided cost should be paid to Ultra Cogen and resisted before the VSCC Ultra Cogen's effort to base avoided costs on administratively determined procedures instead of competitive bids. When the VSCC rejected these good faith efforts through valid, lawful orders, Virginia Power promptly executed the contracts as ordered containing the terms required to permit the QF to build its projects. No appeal was taken because the VSCC had acted within its delegated federal authority over these rates.

The United States suggests, echoing the North Carolina interests, that Virginia Power was remiss in failing to appeal the VSCC orders and in not immediately filing its VSCC mandated contracts with the NCUC so that North Carolina could join in the appeal. The United States suggests that the appeal should have been based on an "ambiguity" as to whether the VSCC opinion was based on Virginia or federal law. Brief at 17-18. At the time of the VSCC decision, of course, no ambiguity existed; FERC itself had not come definitively to a conclusion on the issue of whether independent State authority existed to set a wholesale rate in the 1987-88 time frame.[7]

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[7] *See* discussion, Brief for United States of January 1996, at 4-5.

If FERC was unsure on this issue, it is unlikely that an appeal to the Virginia Supreme Court would have removed the alleged ambiguity.

North Carolina requires executed QF contracts to be filed with the NCUC for informational purposes. Virginia Power had no contract with Ultra Cogen to file in North Carolina until the VSCC had dictated its terms. Filing in North Carolina of the VSCC mandated contract would have had no impact on this dispute. Likewise, Virginia Power may not be legitimately criticized for failing to "file papers" in North Carolina to notify the NCUC of the action the VSCC had undertaken. The VSCC proceedings were initiated against Virginia Power by the VSCC upon Ultra Cogen's petition, and Virginia Power was made a party despite its objections to the contracts. Virginia Power sought no relief as a respondent in the VSCC proceeding that conflicts with any North Carolina interest in any way.

CONCLUSION

No provision of PURPA suggests, much less requires, a result that permits North Carolina to ignore a federal/wholesale rate established for Ultra Cogen in Virginia. The United States' argument that a federal/wholesale rate is without effect beyond the boundaries of the State that sets that rate pursuant to PURPA-delegated authority competes directly with the overriding objectives of PURPA to encourage cogeneration and the national policy to remove restraints on the free flow of wholesale power in interstate commerce.

Virginia relied exclusively upon PURPA to establish avoided costs rates for Ultra Cogen. No State authority was asserted. North Carolina's collateral attack on that federal decision squarely raises the federal preemption issue Virginia Power asserts. The Court should review this issue on the merits.

Respectfully submitted,

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